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No. 99-1848

In The

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the catalyst theory a viable approach to govern federal courts in awarding fees under federal fee-shifting statutes?

LIST OF PARTIES

The list of parties set forth in the Petition for a Writ of Certiorari is generally accurate, with these exceptions. At the time the suit was filed below, Walter Smittle was the West Virginia State Fire Marshal. In the interim, Marshal Smittle retired and was replaced by State Fire Marshal Sterling Lewis. Likewise, Randy Breeden, James W. Fife, Daniel Hess, Gregory Alan Lay, and Stephen C. McBee are no longer State Fire Commissioners. The new Fire Commissioners who have replaced these individuals are John S. Bailey, II, Charles L. Eversole, Wayne A. Lewis, James L. Oldaker, and Chuck Nunyon. Consequently, these new commissioners and the new Fire Marshal are proper parties. *See* S. Ct. R. 35.3.

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CITATION OF REPORTS

The citation of reports set forth in the Petition for a Writ of Certiorari is accurate and will not be restated here.

JURISDICTION

The Petitioner properly invokes the certiorari jurisdiction of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS

1. Statutory Provisions

The Federal Fair Housing Amendments Act provides, in pertinent part:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3613(a)(1)(A).

> In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C. § 3613(c)(2).

The Americans with Disabilities Act provides, in pertinent part:

The abrogation provision of the Americans with Disabilities Act, 42 U.S.C. § 12202, provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this act. In any action against a State for a violation of the requirements of this act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation.

42 U.S.C. § 12202.

> In any action or administrative proceeding commenced pursuant to this act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.S.C. § 12205.

2. Constitutional provisions

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another

> State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Section 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

The West Virginia Fire Control and Prevention Act, W. Va. Code § 29-3-1 to -25, creates the position of the West Virginia State Fire Marshal and the West Virginia State Fire Commission. The Fire Prevention and Control Act authorizes the Fire Commission to promulgate, amend and repeal regulations relating to the safeguarding of life and property from the hazards of fire and explosions. W. Va. Code § 29-3-5(a). The procedural mechanism for implementing this legislative directive is the West Virginia Administrative Procedures Act, found in Chapter 29A, Article 5 of the West Virginia Code (W. Va. APA).

Under the W. Va. APA, West Virginia's administrative agencies do not have the general and independent power to promulgate binding rules. Rather, with certain exceptions

inapplicable here,[1] "legislative rules," (those having the force and effect of law) must be passed into effect by the West Virginia Legislature. *See* W. Va. Code § 29A-3-12.

Under this authority, and prior to 1998, the Fire Commission promulgated certain regulations in the West Virginia Fire Code which included the term "self-preservation." W. Va. Code of State Rules, tit. 87, ser. 1, § 14.7.1. "Self-preservation" was defined to mean "A person is capable of removing his or her physical self from situations involving imminent danger, such as fire." *Id.* § 14.7 The West Virginia Residential Board and Care Homes (RBHC) statute also contained "self-preservation" language. W. Va. Code § 16-5H-1 (noting a state policy to encourage and promote resourcing to ensure the effective care and treatment of the physically or mentally impaired who depend on the care of others and who are capable of self-preservation); *id.* § 16-5H-2(*l*) (defining self-preservation as meaning "that a person is, at least, capable of removing his or herself from situations involving imminent danger, such as fire. . . . "); *id.* § 16-5H-2(j).

The Petitioners challenged the Fire Code's self-preservation regulations and the self-preservation language in the RBHC in the district court. The Petitioners alleged the "self-preservation" language violated, and was preempted by, the Federal Fair Housing Amendments Act (FFHAA), 42 U.S.C. §§ 3601 to 3619, and Titles II and III of the Americans with Disabilities Act (ADA).

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[1] *See* W. Va. Code §§ 29A-5-15 to -15b (discussing "emergency rules"). *See also Appalachian Power Co. v. Tax Dep't*, 466 S.E.2d 424, 434 (W. Va. 1995).

During the pendency of the litigation in district court, the West Virginia Legislature amended the State Fire Code to delete any reference to "self-preservation." *See* II 1998 W. Va. Acts 1198-99. Likewise, the West Virginia Legislature amended portions of the West Virginia RBHC statute by deleting the "self-preservation" language at issue in the case below. *See* I 1998 W. Va. Acts 983-986.

The district court presiding over the litigation dismissed the case as moot in light of the legislative action. It also refused to award attorney's fees considering itself bound by the Fourth Circuit precedent of *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.) (per curiam) (en banc), *cert. denied*, 513 U.S. 876 (1994). A panel of the Court of Appeals for the Fourth Circuit affirmed the district court's refusal on the basis of *S-1 and S-2*. The Court of Appeals subsequently refused the Petitioner's request for an en banc rehearing.

SUMMARY OF ARGUMENT

This Court should not grant the Petition for a Writ of Certiorari as there is a question as to whether the Eleventh Amendment divested the district court of jurisdiction in this case. If the district court lacked jurisdiction over the case, it would have lacked authority to award attorney's fees. Because there exists an important issue of whether the statutes at issue in this case validly or even did waive the states' immunity under the Eleventh Amendment (and the record in this case is not well developed), this Court should not grant the certiorari,

especially since the Court has before it a case where it will address constitutional applicability of the ADA to the states.

Moreover, the facts of this case, where any relief that the Petitioners claim obtained was as a result of third-party legislative action, make it a poor vehicle to address the narrow issue of whether catalyst theory exists at all, as well as a poor vehicle to address whether – if catalyst theory does exist – it should apply when the relief is the result of non-party legislative action. As all of these questions are still being addressed by the lower federal courts, this Court should not take this case and await a better vehicle to address the issues this case raises.

REASONS FOR DENYING THE WRIT

A. This Court Should Not Grant Certiorari In This Case As There Exists A Question Of The Jurisdiction Of The Courts Below To Entertain It And This Case Is Not A Good Vehicle To Resolve Any Of The Issues The Case Presents.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute. . . . " *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "Since federal courts are courts of limited jurisdiction, the court below could hear the case only if authorized by statute." *Bell v. New Jersey*, 461 U.S. 773, 777 (1983).

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 95 (1998) (citations omitted). "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). In the proceedings below, the Respondent Fire Marshal raised the Eleventh Amendment issue in its answer, which was apparently not pressed by the Respondent below.

Before this Court may proceed further in this proceeding, it must satisfy itself that the lower court had jurisdiction. *See, e.g., Steel Co.*, 523 U.S. at 95. In the absence of subject matter jurisdiction, a court's orders are void. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("[i]f a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed."). " 'Without jurisdiction the court cannot proceed at all in any cause.' "

Steel Co., 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Thus, if the district court lacked jurisdiction over this case, its authority was limited to " 'announcing the fact and dismissing the cause.' " *Steel Co.*, 523 U.S. at 94 (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Any act beyond a dismissal would be void. *See, e.g., Ex Parte Reed*, 100 U.S. 13, 23 (1879) ("Every act of a court beyond its jurisdiction is void.") *See also Vermont Agency for Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1865 (2000) ("Questions of jurisdiction, of course, should be given priority – since if there is no jurisdiction there is no authority to sit in judgment of anything else.")

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment acts in the nature of a jurisdictional check on the lower federal courts. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (recognizing that the Eleventh Amendment "partakes of the nature of a jurisdictional bar. . . . ").

The Congress, however, may abrogate a State's immunity by enacting legislation pursuant to its enforcement authority under section 5 of the Fourteenth Amendment and by making its intent to abrogate the State's immunity "unmistakably clear" in the statute. *See, e.g., Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (1999)

("To determine whether a federal statute properly subjects States to suits by individuals, we apply a 'simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." ' *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S. Ct. 2397, 105 L. Ed. 2d 181 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985)."); *id.* at 644 ("Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity."). In this case, neither of the federal statutes under which the Petitioners proceeded in district court meets the abrogation criteria.

1. The Federal Fair Housing Act Amendments Of 1988

In order for the Congress to validly abrogate a state's immunity, it must make its intention "unmistakably clear" in the statute. *See, e.g., Kimel*, 120 S. Ct. at 640 (citations omitted). This Court addressed in several cases the clarity necessary to evidence a Congressional abrogation of the states' immunity. For example, in *Kimel*, this Court addressed the abrogation language of the Age Discrimination in Employment Act (ADEA). In finding the ADEA evidenced a Congressional waiver, the Court reasoned:

> The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U.S.C. § 626(b). Section 216(b), in

> turn, clearly provides for suits by individuals against States. That provision authorizes employees to maintain actions for backpay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . . " Any doubt concerning the identity of the "public agency" defendant named in § 216(b) is dispelled by looking to § 203(x), which defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Kimel, 120 S. Ct. at 640.

Equally, in *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996), the Court found "a clear legislative statement" of a Congressional intent to abrogate the States' immunity under the Indian Gaming Regulatory Act by reasoning:

> Section 2710(d)(7)(A)(i) vests jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon

> the State . . . "; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . . , the court shall order the State . . . "; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.

Seminole Tribe, 517 U.S. at 56-57.

Nothing in the Federal Fair Housing Amendments Act of 1988 (FFHAA), 42 U.S.C. §§ 3601 to 3619, 3631, contains any such expansive language which provides either a "clear legislative statement" or which makes unmistakably clear a Congressional intent to abrogate the states' immunity. Indeed, 42 U.S.C. § 3602(n) defines "Respondent" as "(1) the person or other entity accused in a complaint of an unfair housing practice; and (2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 810(a)." Under long settled canons of construction, a court must presume a state is not a "person" as that term is used by Congress. *See, e.g., Vermont Agency of Natural Resources*, 120 S. Ct. at 1866 ("We must apply to this text our longstanding interpretive presumption that 'person' does not include the sovereign."); *Will v. Michigan Dep't of State Police*, 491 U.S.

58, 65 (1989) (the state is not a "person" under 42 U.S.C. § 1983). "The presumption is 'particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.' *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979)." *Vermont Agency of Natural Resources*, 120 S. Ct. at 1866-67. The presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id.* at 1867.

Indeed, the private cause of action provision in the FFHAA, 42 U.S.C. § 3613(a), is remarkably similar to the statutory language this Court found did not affect a Congressional waiver of the states' sovereign immunity under the Fair Labor Standards Act (FLSA). In *Employees of Dept. of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 283 (1973), this Court concluded that FLSA terminology providing an "[a]ction to recover such liability may be maintained in any court of competent jurisdiction" did not abrogate the states' immunity. *See also Kimel*, 120 S. Ct. at 654-55 (Thomas and Kennedy, JJ., dissenting in part and concurring in part) (relying on *Employees*); *id.* at 655 (recognizing that in *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), the Court held "that Congress had not clearly stated its intent to abrogate in a statute that authorized 'parties aggrieved . . . to "bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy")' (quoting 20 U.S.C. § 1415(e)(2) (1982 ed.)").

The private enforcement provision of the FFHAA provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State Court. . . . " 42 U.S.C. § 3613(a)(1)(A). In *Delmuth v. Muth*, 491 U.S. 223, 231 (1989) (quoting *Atascadero v. Scanlon*, 473 U.S. 234, 246 (1985)), this Court said, " '[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' " Thus, the *Delmuth* recognition is of even greater strength here, where the Congress has authorized suits not simply in Federal court, but in state court as well.

Of course, the FFHAA contains an explicit statutory preemption clause. 42 U.S.C. § 3615. A preemption clause, however, is not a clear and unmistakable abrogation of state immunity. *Cf. In re Mitchell*, 209 F.3d 1111, 1121 (9th Cir. 2000) (emphasis in original) ("Similarly, the Supremacy Clause dictates that federal law trumps state law, but does not *itself abrogate* state sovereign immunity in federal court: although a state may be bound by federal law, a private party is not entitled to utilize a federal court to determine a state's obligations."). This is especially so where state courts – equal partners in the constitutional scheme for adjudicating the supremacy of federal law[2] – have undertaken to adjudicate and enforce preemption in their state courts. *See, e.g., Satterfield v. Claypool*, 438

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[2] *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 28 (1990) (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816)) (" '[I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction.' ").

S.E.2d 564, 565 (W. Va. 1993) (holding that federal law preempted state law); *Risbeck Food Markets, Inc. v. United Food and Commercial Workers Union*, 404 S.E.2d 404, 405 (W. Va. 1991) (similar).

Nothing in the FFHAA includes any language evidencing Congress' clear intent to abrogate the states' immunity. If anything, it contains certain language similar to that which this Court has found does not affect an abrogation.

The Petitioners seek certiorari so this Court may address the validity of the catalyst theory. However, in order for this Court to reach the catalyst issue, it would first have to address the important and intricate immunity issues. This Court should not grant certiorari in this case, but, rather, should await the presentation of a case more cleanly presenting the catalyst issue and a case more cleanly presenting the immunity issues.

2. The Americans With Disabilities Act

There is no doubt that Congress clearly evidenced an intent to abrogate the states' immunity under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 to 12213. Title 42, section 12202 of the United States Code provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this act. In any action against a State for a violation of the requirements of this act, remedies (including remedies both at law and in equity)

> are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

The question becomes whether this abrogation is consistent with the remedial power granted to Congress under Section 5 of the Fourteenth Amendment. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2205 (1999) (reiterating that Congress cannot divest the states of their sovereign immunity under Article I).

If the abrogation of the states' immunity under 42 U.S.C. § 12202 is invalid, then the district court in the pending case would have had no jurisdiction to award attorneys fees at all. *See Finn v. United States*, 856 F.2d 606, 608 (4th Cir. 1988) ("[I]f subject matter jurisdiction has not been found to attach when the plaintiff obtains the desired relief, plaintiff's success outside the courtroom cannot be a proper basis for an award of EAJA fees.").

Currently, this Court has granted certiorari in *Garrett v. University of Alabama*, 193 F.3d 1214 (11th Cir. 1999). Because *Garrett* presents the same issue as the case *sub judice* would present, that is, the constitutionality of the ADA (and presents it with a fully developed record), the Court should not grant the writ in this case.

B. This Court Should Not Grant Certiorari In This Case As It Presents A Less Than Desirable Vehicle To Address The Validity Of Catalyst Theory.

The Petitioners seek review in this Court to determine whether the catalyst theory is a viable approach to the award of attorneys fees under federal fee-shifting statutes. The facts of this case, however, are more complex than those associated with normal factual backgrounds presenting the catalyst theory (assuming, of course, that catalyst theory is viable). Consequently, this case presents an inappropriate vehicle to address either the narrow issue of whether catalyst theory exists at all or as the broader issue of whether catalyst theory (if it exists) should be construed to extend to the facts of this case.

In the proceedings below, the district court dismissed the Petitioners' suit as moot after the West Virginia Legislature removed the "self-preservation" language from the West Virginia Fire Code, W. Va. Code of State R., tit. 87, ser. 1, and from the Residential Board and Care Homes Statute. W. Va. Code § 16-5H-2 (Supp. 2000).

Under the catalyst theory, a plaintiff would be entitled to fees if the lawsuit was a "catalyst" that caused (from the plaintiff's perspective) a positive outcome. The tests the lower courts have applied range from whether the litigation was a "provocative function," *see, e.g., New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998), or a "substantial factor or significant catalyst," *see, e.g., Foreman v. Dallas County*, 193 F.3d 314, 321 (5th Cir. 1999), or whether the litigation was a "but for" cause. *See, e.g., Milton v. Shalala*, 17 F.3d 812, 814 (5th Cir. 1994). Implicit

in all these cases, and in the catalyst theory generally, is whether the party requesting an award of fees has proven the litigation caused the change in the defendant's behavior. It is this recognition that makes this case an inappropriate vehicle to address catalyst theory. In this case, any relief the Petitioners claim to have received came not from a party to the ligation, but from a legislature that was not a party to the litigation. This being the case, there exists significant procedural and policy impediments to establishing a catalyst theory when the legislature acts. As this Court recognized in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), "[a] request for attorney's fees should not result in a second major litigation."

The lower federal courts have addressed cases where parties wished to apply a catalyst theory to legislative acts occurring during federal litigation. A prototypical example of this is litigation resulting from the Social Security Disability Reform Act of 1988 ("the Reform Act"). The Reform Act mandated that federal actions then pending concerning Social Security disability be remanded to the Secretary of Health and Human Services to determine whether disability benefits should be terminated in light of newly enacted standards. Numerous parties in federal court seeking judicial review of adverse Social Security disability determinations under the old standards won benefits under the legislative remand. These parties then sought an award of attorneys fees under the Equal Access to Justice Act[3] arguing that their

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[3] The Equal Access to Justice Act (EAJA) uses the term "prevailing party." 28 U.S.C. § 2412(b). Therefore, the cases of lower courts under the EAJA have bearing on any case where

pending lawsuits were the catalyst for the Congressional action.

In rejecting this approach, the court of appeals in *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994) incisively noted:

> The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes. We agree with the cases that have refused to credit the change in law to a claimant's individual law suit and found the nexus between Congress's action and the law suit too attenuated.

The Fifth Circuit found support in its position under *Petrone v. Secretary of Health and Human Services*, 936 F.2d 428, 430 (9th Cir. 1991); *Hendricks v. Bowen*, 847 F.2d 1255, 1258 (7th Cir. 1988); and *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988). *But see Rhoten v. Bowen*, 854 F.2d 667 (4th Cir. 1988); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 917 (3d Cir. 1985).

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the Congress employs the statutory term "prevailing party." *See, e.g., Hensley*, 461 U.S. at 433 n.7; *Texas Teachers v. Garland School Dist.*, 489 U.S. 782, 784 (1989) (discussing the need to resolve the definition of "prevailing party" under section 1988 and other federal fee-shifting statutes.) *See generally* 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 17.3 at 6 (2d ed. 1991) ("Congress and the Supreme Court alike have viewed § 1988 and other federal fee-shifting statutes that also provide for reasonable attorney's fees for the successful party in litigation as largely governed by the same interpretive standard.").

The recent Fifth Circuit case of *Foreman v. Dallas County*, 193 F.3d 314, 321-22 (5th Cir. 1999), cogently recognizes why attributing a causative relationship between a lawsuit and a legislative act is a hazardous undertaking – i.e., the legislative process is fraught with compromises, competing interests and unspoken motives. Thus, a plaintiff who attempts to prove that her individual lawsuit was a catalyst behind passage of general legislation faces a "formidable task."

The formidable task is even more imposing in light of the hurdles that our political and federal system places upon a plaintiff. For example, this Court has specifically refused to afford any probative value to alter the fact affidavits of congressmen in interpreting the intent of Congress in passing legislation, recognizing that " 'post hoc observations by a single member of Congress carry little weight.' " *Bread Political Action Committee v. Federal Elec. Comm'n*, 455 U.S. 577, 582 n.3 (1982) (quoting *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978)). And, indeed, some jurists have noted the inherent weakness of even contemporary statements from legislative sponsors. *See, e.g., Overseas Educ. Assoc., Inc. v. Federal Labor Relations Auth.*, 876 F.2d 960, 974-75 (D.C. Cir. 1989) (emphasis in original) (Buckley and Starr, JJ., concurring) ("Far less reliable, as sources of statutory meaning, are remarks made during floor debate – even 'authoritative' explanations offered by a bill's sponsors. While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision.").

The hurdle placed upon a plaintiff seeking to prove an entitlement to fees when a legislature acts also confronts the fact that a collegial body acts as a collegial body, not as a conglomeration of individuals. *See id. Cf. Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 545 (1986) (individual member of school board lacked standing to appeal an order when the board did not vote to appeal order).

Moreover, to expose a member of Congress or a state legislature or even a county or municipal legislator to discovery and depositions runs afoul of the long rooted and "unquestioned" principle rooted in our governmental structure that "it [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . " *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1809)), *see Bly v. McLeod*, 605 F.2d 134, 138 n.6 (4th Cir. 1979) (noting the issue of, without deciding, whether catalyst theory would allow a party to inquire into the motives of a legislator in enacting legislation), and threatens to an unprecedented degree federal judicial involvement in state and local legislative activities.

Indeed, this Court has recognized, "[i]nquiries into congressional motives or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), as legislators act for a variety of reasons. *See Michael M. v. Sonoma County*, 450 U.S. 464, 470 (1981). As this Court correctly observed more than a century ago, "[t]he diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885).

Because circuit precedent did not recognize the catalyst theory, there was no basis for an evidentiary hearing exploring these issues. Therefore, this Court lacks an evidentiary record upon which to approach the issue of catalyst theory applied to legislative action to determine if a recognition of catalyst *vis-a-vis* the facts in this case would invite the kind of complex and protracted litigation *Hensley* condemned. The issues, however, as evidenced by *Foreman*, are still being dealt with by the lower federal courts. This Court should not grant certiorari, but should await cases that present better records in order to approach the issues of whether catalyst is a viable theory and, if so, whether the catalyst theory extends to acts taken by a legislative body.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be refused.

Respectfully submitted,

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